1970

Frank Lopez v. John W. Turner, Warden, Utah State Prison : Reply Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

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FRANK LOPEZ,

Appellant,

v.

JOHN W. TURNER, Warden,
Utah State Prison,

Defendant.

Case No. 1

REPLY BRIEF OF APPELLANT

Appeal from the Third Judicial District Court
of Salt Lake County, Utah
The Honorable Stewart M. [illegible]

[illegible]

Appellant

Box 250
Draper, Utah

VERNON B. ROMNEY

Attorney General

State Capitol
Salt Lake City, Utah

Attorney for Defendant

FILED

DEC 19 [illegible]

Clerk, Supreme Court, Utah

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REPLY BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

This is a reply brief in answer to the allegations and arguments as set forth in the brief of the respondent.

ARGUMENT

POINT 1

THE ISSUES RAISED IN THIS APPEAL ARE JUSTICIABLE

Respondent suggests that appellant should have immediately appealed the errors connected with his guilty plea, and that this appeal should be dismissed

because he failed to do so. Respondent cites Bryant v. Turner, 19 U. 284, and Brown v. Turner, 21 U. 2d 96, in support of this claim.

However, the sentence which appellant is serving in the Utah State Prison was imposed on March 14, 1966. In 1967, the supplement to vol. 8 U.C.A. was published, which contained guidelines for the acceptance of guilty pleas by Utah trial courts (77-24-6, U.C.A., 1967 supp.). During the summer of 1969, and after appellant had filed his notice of appeal in this case, Boykin v. Alabama, 395 U.S. 238, and Belgard v. Turner, Case No. C 95-69 (D.C. Utah), were both decided by the courts.

This appeal is valid and complies with Bryant because, in addition to a denial of due process, unusual circumstances are present in this case.

The past few years have witnessed a number of new legal guidelines written by the U.S. Supreme Court, and the application of these standards to existing law has substantially revised the scope of judicial review. Appellant was not able to anticipate these future court decisions regarding constitutional guarantees for one

who plead guilty, and so did not at the time understand the nature and extent of the errors stated in this appeal.

Therefore, the issues presented in this appeal are not res judicata, because until these court decisions explaining a trial court's duties with regard to acceptance of guilty pleas were published, the nature of the errors stated in this appeal and their relation to the constitutional guarantees as explained in Boykin and Belgard were not "something which (was) known or should be known . . . at the time judgment was entered," so this appeal is in accordance with the principles stated in Brown v. Turner, supra, by virtue of the rule of law set forth in Linkletter v. Walker, 381 U.S. 618 (1965).

POINT II

POINT 1 OF APPELLANT'S BRIEF IS A VALID ISSUE

Appellant is appealing an order of dismissal of his petition for a writ of habeas corpus (No. 185104, April 16, 1969) wherein the Honorable Stewart M. Hansen stated:

". . . the petitioner was properly sentenced,

that he had very competent counsel. . . ." (Emphasis added.)

Since this was the conclusion of the lower court, and the grounds upon which the petition was denied, the question of the adequacy of defense counsel must, of necessity, be considered an integral part of the proceedings, and therefore is subject to attack on appeal.

Also, appeal is a right, and guaranteed under Utah Law by Section 77-1-8(7), U.C.A.(Vol. 8).

POINT III

APPELLANT WAS NOT ADEQUATELY REPRESENTED BY COUNSEL

When a defendant enters a plea of guilty in court, the proceedings are usually, as in appellant's case, summary, and the gravity of the errors committed may not be apparent until after the hearing is completed.

Unlike the case of People v. Klimek, 172 Cal. App. 2d 36, which was a jury trial and continued for a considerable length of time, appellant's appearances in court generally lasted for only a matter of a few minutes, and he did not completely understand the nature of the proceedings or realize their outcome.

In addition, appellant did not believe that he was

required to enter objections and, in effect, conduct his own defense, for he assumed that his court appointed attorney would see that his rights were protected and properly represent him.

This Court has explored this matter in the case of State v. Mannion, 19 U. 505, and therein declared:

> "That which law requires and makes essential on trial of defendant, charged with felony, cannot be dispensed with, either by consent of defendant or by his failure to object to unauthorized methods pursued by those in authority."
> (As cited in Vol. 8, U.C.A., Section 77-1-8, 1.)

Before appearing in court to change his plea, appellant had been advised and assured by Mr. Mitsunaga, his court appointed counsel, that he could expect clemency from the court by so pleading and that such clemency would be in the form of a sentence in the County Jail on a misdemeanor charge. This is substantiated in part by page 4 of the transcript of the hearing (respondent's supplemental record) where Mr. Mitsunaga requested that the court refer appellant's case to the probation and parole department.

Such inducements by attorneys to pursuade a defendant to change his plea were reecently ruled to be

unconstitutional by the Supreme Court of Missouri in State v. Rose, 440 S.W. 2d 441, and the court said, in essence, that:

> "Proof that defendant's guilty plea was induced by his attorney's assurances that probation would be granted would entitle defendant to vacatur of his plea."
> (Quoted from Criminal Law Bulletin, Sept., 1969, p. 442.)

While probation was not expressly promised in this case by counsel, clemency in the form of a light sentence was used to effect a change of plea.

However, at the sentencing hearing, Mr. Mitsunaga was absent, and the court made no reference to any report that may have been received from the probation department, nor were any other matters mentioned, either by the court or by counsel, touching on the circumstances of the case regarding recommendations or possibilities of probation, leniency, or a possible jail sentence.

In this particular case, the sentencing session was probably the most crucial stage of the court proceedings; and Mr. Mitsunaga, who was familiar with all of the aspects and ramifications concerning the case, was not present in order to insure that his promises of leniency

or his request for a recommendation by the probation department had been looked into by the court. Such an error was considered unconstitutional as violating a defendant's Sixth Amendment guarantees in U.S. v. Smith, 411 F. 2d 733 (6th Cir., 1969), where the court held that defence counsel's involuntary absence because of illness at the time when the jury verdict was returned was a denial of the right to effective assistance of counsel at all critical stages of the proceedings against him, and the district judge's polling of the jury did not cure the error.

Appellant submits that his counsel's absence at the sentencing hearing was an error even more grave than that which took place in Smith, for it was appellant's trust in the promises and assurances of defence counsel that caused the guilty plea to be entered.

Utah law is also explicit on this matter, for a collateral reference in 77-1-8, U.C.A. (Vol. 8), alludes to 28 A.L.R. 2d 1240, by quoting:

> "Absence of counsel for accused at time of sentence as requiring vacation thereof or other relief."

POINT IV

APPELLANT WAS NOT FULLY ADVISED OF THE CONSEQUENCES OF HIS GUILTY PLEA

The respondent alleges that appellant was thoroughly advised of the consequences of his guilty plea, and has submitted a transcript of the proceedings to substantiate this claim. (This transcript, incidently, is incorrect.)

A reading of this record will, however, show that appellant's case is not dissimilar to that of Belgard v. Turner, Case No. C 95-69 (D.C. Utah), in that nowhere in the record is there any indication that appellant was advised of any constitutional rights, or that he understood the nature of the charge. He was only told that he might be sent to prison.

This was a deciding factor in Belgard, as the court explained on pages 7, 8 and 9 of the opinion:

> "On such a record, serious questions arise as to the voluntariness and particularly as to the understanding nature (Sic) of the plea . . . . Unlike the record in Boykin (Boykin v. Alabama, 395 U.S. 238), the record before us here is not silent , but it is hardly better and in some respects it is worse, than a silent record. Without leaving the matter to a matter of presumption or supposition, perhaps consistent

> with the idea that advice actually was given, the record expressly shows that the plaintiff did not have explained to him the nature of the charge, anything about possible defenses, . . . and other matters which would be necessary to understand in order to render a plea knowledgeable. The only vital thing the plaintiff was told was the extent of the possible punishment. . . ."

The record in the present case, as in Belgard, does not show that appellant was advised of any rights guaranteed by the Constitution; and this was held by the U.S. Supreme Court in Boykin to be requisite for an intelligent waiver. These rights include: the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Malloy v. Hogan, 378 U.S. 1. The right to a trial by jury. Duncan v. Louisiana, 391 U.S. 145. The right to confront one's accusers. Pointer v. Texas, 380 U.S. 400.

These same rights and privileges are also assured by Article 1, Sections 7 and 12 of the Constitution of Utah, and by Section 77-1-8, U.C.A. (Vol. 8).

Appellant submits that he was not advised of the nature of the charge to which he entered a plea of guilty, and was not advised of his rights in relation

to this charge and the plea entered thereto; especially since appellant has only just discovered that in order for a crime of theft to constitute grand larceny, the money or property taken must exceed the value of fifty dollars, and the amount allegedly stolen by appellant and his co-defendant in the crime with which he was charged and to which he plead guilty was less than thirty dollars.

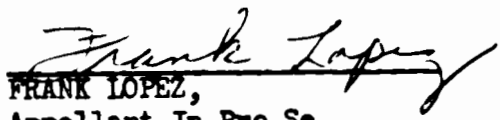
The court did not seek to determine whether grand larceny as defined in Section 76-38-4(1)(Vol. 8, U.C.A.) actually had been committed, and also did not advise appellant that if less than fifty dollars was involved in the theft, he could not be guilty of grand larceny, and therefore he did not make a knowledgeable waiver or enter a valid plea to this charge, as aforesaid.

CONCLUSION

From the foregoing, in addition to his brief, appellant suggests that he has been substantially denied due process and equal protection of the laws, in that he was not made aware of the fact that the crime with which he was charged could not be construed as grand larceny because the amount taken was less than fifty dollars.

Consequently, the sentence imposed by the lower court was not only improper; it was illegal. Appellant therefore again urges this Court to reverse the decision of the lower court and set aside his plea of guilty.

Respectfully submitted,



FRANK LOPEZ,
Appellant In Pro Se

December 11, 1969